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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

COMMENTS

Black Citizens for a Fair Media, Center for Media Education, Chinese for Affirmative Action, Communications Task Force, League of United Latin American Citizens, Minority Media Telecommunications Council, National Association for Better Broadcasting, NOW Legal Defense and Education Fund, Office of Communication of United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, Women's Institute for Freedom of the Press (Commenters) hereby submit comments in response to the Commission's Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996 [hereinafter Second Further Notice, or Second FNPRM]. Commenters are public interest organizations representing the interests of broadcast listeners and viewers in local markets across the country.

Commenters oppose repealing the radio/television cross-ownership rule because its elimination would diminish the number of independent media voices, thereby reducing the diversity of viewpoints available to the public at the local level. Similarly, Commenters oppose relaxing the radio/television cross-ownership presumptive waiver policy because such an action

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would limit viewpoint diversity, reduce the public's options for viewing local news, public affairs and issue-responsive programming, and increase entrance barriers for women and minorities. In addition to opposing any relaxation of the presumptive waiver policy, Commenters also advocate that the Commission tighten its scrutiny of waiver requests under the five-factor case-by-case analysis.[1]

THERE IS NO RECORD TO SUPPORT THE ELIMINATION OF THE RADIO/ TELEVISION CROSS-OWNERSHIP RULE OR THE RELAXATION OF THE RADIO/TELEVISION CROSS-OWNERSHIP WAIVER POLICY.

In the Second Further Notice the Commission revisits the radio/television cross-ownership rule in view of changes that the Telecommunications Act of 1996 made in the rules governing local radio and television ownership.[2] The Commission asks whether it should eliminate the radio/television cross-ownership rule either on the basis that radio and television stations are not substitutes because they do not compete in the same markets or on the basis that radio and television same-service ownership rules alone are sufficient to ensure diversity and competition in the local market.[3] In the alternative, the Commission proposes to modify its waiver policy.

A. Repealing the radio/television cross-ownership rule would diminish diversity of viewpoints at the local level.

The Second Further Notice suggests in ¶ 60 that if radio and television do not compete in

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[1]These comments address only the proposed changes to the radio/television cross-ownership rule. Commenters address other issues in this docket in separate comments also filed this day.

[2]The Commission had previously proposed changes to the radio/television cross-ownership rule in Further Notice of Proposed Rulemaking, MM Docket Nos. 87-8 and 91-221, 10 FCC Rcd 3524 (1995) (TV Ownership Further Notice).

[3]Second FNPRM ¶¶ 63, 64.

local markets, the Commission could safely eliminate the radio/television cross-ownership rule. Regardless of whether they are substitutes in an economic sense, both television and radio stations provide local news, issue-responsive programming and public affairs. When such programs are provided by different owners, they are providing diverse viewpoints to the public. Repealing the rule would reduce the number of independent media voices, and hence, the diversity of viewpoints.[4]

Moreover, the Commission cannot rely on local radio and television ownership rules alone to ensure sufficient diversity and competition in the local market. The current local same-service radio and television ownership rules have been recently expanded, or are under consideration to be expanded, and their ability to protect diversity in viewpoints in the local markets is untested.

If anything, the radio/television cross-ownership rule is more important to the protection of diversity now than in the past. The Telecommunications Act of 1996 has placed broadcast industry in a state of flux by increasing the number of stations that entities can own at both the national and local levels. Entities in the same-service radio market can now own as many as eight stations.[5] Owners of television stations can reach up to 35 percent of the national audience.[6]

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[4]The provision of news, public affairs and issue-responsive programming are central to diversity. Black Citizens for a Fair Media, Comments, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, filed May 17, 1995, at 5-6

[5]Entities can own up to 8 radio stations in markets of 45 or more, up to 7 stations in markets of 30-44, up to 6 in radio stations in markets of 15-29 or up to 5 stations in markets of 14 or less. Telecommunications Act of 1996 § 202, 47 U.S.C. § 151 et. seq.

[6]Telecommunications Act of 1996 § 202(c)(1)(b).

Already, radio and television entities are tying the knot in mergers of giant proportions.[7] Thus, under current market considerations, the radio/television cross-ownership rule is essential to protecting diversity at the local level and should not be repealed.

B. Relaxing the radio/television cross-ownership presumptive waiver policy by implementing the proposed modifications would hamper diversity by limiting the public's options for viewing local news, public affairs and issue-responsive programming.

Just as the repeal of the cross-ownership rule would harm the public, so would significant relaxation of the Commission's already liberal presumptive waiver policy. The Telecommunications Act of 1996 directs the Commission to expand eligibility for the presumptive waiver policy to the Top 50 markets, and Commenters believe that the Commission should defer to this figure. Congress also expects that the Commission's decisions on altering the waiver policy will "take into account the increased competition and the need for diversity in today's radio marketplace."[8] Thus, the Commission should at least wait until the required biennial evaluation period before making any additional changes to its waiver policy.[9] After the two year period, the

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[7]After its $4.9 million purchase of Infinity Broadcasting, Westinghouse/CBS owns 77 stations and dominates the top ten markets. News Corp.'s $2 million acquisition of New World Communications has made it the top television station owner. After a $1.13 billion purchase of Renaissance Communications, the Tribune Company has 16 stations that reach one third of the nation's households. Clear Channel Communications has acquired more than 100 radio stations and now operates 121 nationwide. A.H. Belo Corporation has acquired 16 television stations. After a $365 million acquisition of 12 radio stations, Chancellor Broadcasting Co. owns 53 stations in 15 markets. Neil Hickey, So Big: The Telecommunications Act at Year One, Colum. Journalism Rev., January-February 1997, at 23.

[8]H.R. Conf. Rep. No. 104-458, at 163 (1996).

[9]Telecommunications Act of 1996 § 202(h).

Commission will be able to evaluate the actual, and not the predicted, consequences of expanding its waiver policy to the Top 50 markets.

In addition, given Congress' expansion of the presumptive waiver policy to the Top 50 markets, the Commission should be wary of reducing the minimum independent voice requirement. While Commenters would prefer that the Commission not set any minimum number of voices, but instead adopt policies to maximize the number of voices, we strongly oppose reducing the minimum below 30. In the Second FNPRM, the Commission identified the 30 independently owned voices test as a primary restraint on radio-television mergers and found that it effectively protected diversity and competition in the Top 25 markets.[10] Diversity is dependent upon variety in ownership, and the minimum independent voice requirement is the only way to ensure that variety. Part of the justification for having a "presumptive waiver" is the assumption that "a very large number of broadcast outlets and separate voices will remain" in the local markets.[11] Reducing the minimum independent voice requirement undercuts that rationale. In addition, because the effect of making the Top 50 markets eligible for the presumptive waiver rule is not yet known, lowering the required minimum number of independent voices at this time would be premature.[12]

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[10]Second FNPRM ¶ 66.

[11]WSB, Inc. v. Federal Communications Commission, 85 F.3d 695, 701 n.15 (1996) ("The 'presumptive waiver rule' is 'based on the fact that a very large number of broadcast outlets and separate voices will remain in these large markets, thereby preventing any single outlet or firm from obtaining undue economic power or undue sway over the public opinion.'") (citing 4 FCC Rcd at 1751).

[12]Entities that do not meet the 30 independent voice requirement are not completely barred from acquiring additional stations. They can acquire stations that have failed or are on the verge of failing, or they can acquire stations by meeting the five-factor case-by-case analysis. Id

Commenters also oppose granting waivers where the end result would be to allow media entities to own multiple radio stations in addition to a television station.[13] The expansion of the local radio ownership rules permits entities to own, in some cases, up to 8 radio stations in the same market. Allowing the owners of multiple radio stations to acquire also a television station (or vice-versa) would have a greater detrimental effect on diversity in local markets than expanding same-service ownership would have, due to the significant role that television has in providing local news, public affairs and issue-responsive programming. The Commission should prevent entities from diluting diversity by acquiring such broad control of local media.

The Commission should not expand the definition of "independently-owned voice" to include recently developed media forms, such as MMDS, DBS, OVS and on-line services. MMDS, DBS and OVS are subscription services that many members of the public do not have access to or cannot afford.[14] In any case, these services do not carry local coverage, news and issue-responsive programming.

While on-line services can potentially provide a plethora of options for local news, issue-responsive programming and public affairs, on-line news services are also not widely accessible to

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at 700.

[13]For a fuller explanation of these views, <u>See</u> Black Citizens for a Fair Media, <u>et</u> <u>al</u>. Comments, <u>Newspaper/Radio Cross-Ownership</u>, MM Docket No. 96-197, filed February 7, 1997, at 13-14.

[14]Of the 97 million households with television, only about 4 million subscribe to DBS. MMDS reaches even fewer people with slightly over one million subscribers, there are fewer than 2,200 OVS subscribers. <u>Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming</u>, CS Docket No. 96-133, January 2, 1997, at 131.

the public or even used by those with access.[15] In addition, many on-line news services with substantial presence are not separately owned, but are expansions of established news outlets. The information available on these on-line services is often a replication of the news provided by the news services that have spawned them.[16]

C. Relaxing the radio/television cross-ownership rule would decrease diversity by increasing entrance barriers for women and minorities.

Relaxing the radio/television cross-ownership rule would also create new entry barriers for small businesses and minorities seeking to enter local media markets.[17] Women and minorities add to the variety of viewpoints that will affect programming decisions and affect a station's offerings of local news, public affairs and issue-responsive programming.[18] However, women and minorities are still underrepresented among broadcast owners, and repealing the radio/television

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[15]Laurence Zuckerman, Don't Stop the Presses! Newspapers Balk at Scooping Themselves on Their Own Web Sites, N.Y. Times, January 6, 1997, at D1 (Describing the on-line news services of newspapers as "fledgling" and their use by the public as "low.").

[16]In addition, in many cases, media outlets withhold information from their on-line counterparts because they are worried about "scooping" themselves or "tipping their hands to their competitors." Id.

[17]See Black Citizens for a Fair Media, et al. Comments, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 94-149 and 94-140., filed May 17, 1996. For a fuller explanation of these views, See Black Citizens for a Fair Media, et al. Comments, Newspaper/Radio Cross-Ownership, MM Docket No. 96-197, filed February 7, 1997.

[18]David. D. Haddock and Daniel D. Polsby, Bright Lines, The Federal Communications Commission's Duopoly Rule, and the Diversity of Voices, 42 Fed. Com. L.J. 331, 348 (1990) (citing M. Spitzer, Justifying Minority Preferences in Broadcasting 7-31(California Institute of Technology Social Science Working Paper No. 7181, 1990), finding that there is data consistent with the position that racial and sexual diversity in ownership increases the number of programs that interest minorities and women.).

cross-ownership rule would further reduce their presence.[19] The squeezing-out effect recent changes have had upon small entrepreneurs and minorities is already evident.[20] In addition, the cloud that recent cases like Adarand have placed over minority ownership policies makes a non-race based policy that does encourage minority ownership, like the radio/television cross-ownership rule, a primary mechanism for removing entry barriers.[21]

D. The Commission should tighten its scrutiny of waiver requests that are subject to analysis under the five-factor case-by-case test.

The Second Further Notice asks in ¶ 73 whether the five-factor test should be changed to make it more effective in protecting competition and diversity.[22] Commenters support retaining the five-factor standard because it ensures that the Commission will use a preset standard in evaluating waivers and it provides a means to evaluate the Commission's decisions. However, Commenters urge the Commission to promote diversity by requiring all waiver applicants to meet the first part of the test by showing that the public benefits of common ownership are concrete and demonstrable.

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[19]Antoinette Cooke Bush and March S. Martin, The FCC's Minority Ownership Policies From Broadcasting to PCS, 48 Fed. Com. L.J. 423, 424-425 (1996).

[20]Neil Hickey, So Big; The Telecommunications Act at Year One, Columbia Journalism Review, January-February 1997 at 23

[21]Adarand Constructors, Inc. v. Pena, 115 St. Ct. 2097 (1995) (Minority preferences in contracting must pass a strict scrutiny test that would require a showing of specific evidence of "pervasive, systematic and obstinate discriminatory conduct.")

[22]Entities that are unable to qualify for a presumptive waiver must undergo a five-factor analysis for approval of their waiver request. These factors are: 1) the public benefits of common ownership; 2) the type of the facilities involved; 3) the financial status of the station that is being purchased; 4) the number of stations that the applicant already owns in the market, and 5) the diversity of the market if the waiver request is approved.

In some instances, the Commission has granted waiver requests under the five-factor analysis without requiring applicants to make a specific showing of public benefits. In these cases, entities offer detailed numerical information demonstrating the financial efficiencies that would result from acquiring additional stations, with only vague promises that their proposed mergers would "allow" them to initiate new programs.[23] Waiver applicants have made much of possible improvements to facilities and equipment, the sharing of news personnel and the duplications of offerings, such as weather programs. But these improvements, while positive for over-all broadcast delivery, do not increase program or viewpoint diversity.

Commenters argue that all applicants under the five-factor test should be required to make such a specific showing of public benefit. For instance, entities should show how much of their financial savings they will direct toward improving existing programming or creating new programming, and in subsequent post-approval submissions, entities should provide evidence of specific programs that emerged as a result of the consolidation. Applicants should also notify the Commission when any changes in programming or otherwise are made that violate the terms

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[23]See e.g. Infinity Holdings Corp. of Orlando and Cox Radio, Inc., FCC 96-494 (1996) (Cox received a waiver based in part on vague promises that a merger would allow the company to "be in the position" to offer coverage of town meetings, sporting events and political debates on one or more radio stations.); US Radio Stations, L.P., 11 FCC Rcd 5772, 5773 (1996) (Applicant granted waiver after detailing $143,000 in annual savings in one station, but could only promise rather than show how those savings would "allow" it to focus programming toward the African-American community.) See also Atlantic Morris Broadcasting, Inc. 10 FCC Rcd 9495, 9496 (1995); James M. Ward 10 FCC Rcd 8741, 8742 (1995); Alta Gulf FM, Inc. 10 FCC Rcd 7750, 7751 (1995). These approved waiver applications contrast with other applications, which show pre-approval efforts to develop programs and apply potential savings to the public benefit. See e.g. Newmountain Broadcasting II, Corp. 11 FCC Rcd 2344, 2345 (1996) (Applicant developed a regularly-scheduled public affairs program for African-Americans to be aired on the new station. In addition, applicant mentioned specific resources -- both physical and human capital -- that it planned to share with its newly acquired station, as well as specific programs that it would adapt for airing, and community-affairs ventures it would expand.)

under which the waiver was granted. Moreover, entities should submit reports biennially so that the Commission may evaluate how well those entities have provided the promised benefits; and if they have not, the Commission should rescind their waivers. As the Commission has noted, because the five-factor test applies to entities who do not obviously meet its presumptive waiver standards, it is supposed to be more rigorous than other waiver tests.[24] Consequently, in these cases, the Commission cannot assume that benefits will result from consolidation, but rather the Commission should require demonstrable benefits.

CONCLUSION

The Commission should not repeal the radio/television cross-ownership rule, nor should it relax the radio/television cross-ownership waiver policy. Either action would diminish diversity of viewpoints at the local level and increase entry barriers for women and minorities. Moreover, the Commission should apply more strictly its five-factor test to require a showing of demonstrable benefits to the public.

[24]"If applicants do not meet either of these standards, their applications must be evaluated under a more rigorous case-by-case standard." WLDI, Inc. 10 FCC Rcd 12150 (1995).

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